

ADMINISTRATIVE-INTERNAL USE ONLY

Ala 74-0959

S. 3393

9 May 1974

MEMORANDUM FOR: Office of Legislative Counsel

ATTENTION :

STATINTL

SUBJECT : Comments on S. 3399 and S. 3393

REFERENCE : OLC Request for Comments on S. 3399 and S. 3393,
dated 7 May 1974

1. On examination, S. 3399 appears to be identical with H. R. 12004. Earlier this year we were furnished with a copy of the detailed analysis OGC prepared concerning that bill, dated 16 January 1974, and our comments on OLC's proposed reply to Chairman Holifield were submitted as of 25 February 1974. In commenting on S. 3399 we have nothing to add to the OGC analysis of H. R. 12004, the OLC draft reply on H. R. 12004, and our comments on the latter, which are equally applicable to the Senate's companion bill.

2. S. 3393 appears to be quite different from any other House or Senate bills relating to classified information which we have received to date. It provides for the establishment of a new office in the Executive Office of the President and a joint committee in Congress to "supervise policies and procedures with respect to the development and review of national defense and foreign policies of the United States and the protection and disclosure of information relating to such policies, and for other purposes." It is introduced as "an effort to restore the balance between secrecy and accountability by restoring the balance between the powers of the executive and legislative branches over national security policy and the information essential to its determination."

3. The bill would establish a "Joint Committee on Government Secrecy," which would have the usual powers of Congressional committees. Its principal duty would be to review the policies and procedures of departments and agencies having custody of classified information and to revise those policies when in conflict with this proposed Act. It may demand a copy of any document for inspection "to determine the propriety of the extent of protection accorded the document." Having reached such a determination, the Committee shall, when appropriate, "direct the public disclosure, in whole or in part, of such document...."

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4. In case of failure by an agency to respond to a Committee directive or subpoena within 15 days, the Committee could bring an action in the U. S. District Court for D. C., and the Court could issue a mandatory injunction to enforce compliance.

5. The Committee would also have the authority and responsibility to:

- a. recommend to Members and other Committees procedures for protecting classified documents in their possession;
- b. recommend action on requests for public disclosure of classified information;
- c. recommend procedures for the handling of classified information by Congressional employees;
- d. make available to Members, other Committees and the public certain information provided by the Registrar;
- e. recommend legislation relating to the protection/disclosure of national defense and foreign policy information; and
- f. file at least annual reports on its findings and recommendations.

6. Further, the bill would establish in the Executive Office of the President an Office of National Defense and Foreign Policy Information, headed by a Registrar, who would maintain a Register of such information. Among his functions he would:

- a. review entries on the Register to determine whether they complied with the basic policy cited in this Act for disclosure or non-disclosure of such information, adjusting entries not in compliance;
- b. recommend to the President procedures authorizing Federal departments and agencies to designate what information relating to national defense and foreign policy should be kept secret or disclosed, and providing for monthly submissions to the Register;

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c. report annually to the President and the Congress on the administration of such orders and regulations, including (1) the numbers and titles of classifying officers in each department/agency, (2) the number of documents or other items classified and declassified during the preceding 12 months in each department/agency, (3) the number of documents or other matters designated during the preceding year to be kept classified for more than three years, and (4) the number and result of investigations during the preceding year in each department/agency into breaches of such regulations and orders;

d. review with the appropriate department/agency officials any proposed final administrative action which would deny any information requests made under the FOIA on the grounds of exemption (b)(1), and to approve or disapprove such action;

e. review and promulgate regulations to standardize within the executive branch procedures relating to secrecy of information, security clearance procedures, routing designations for information, and security measures for automatic data processing systems of secret information.

7. Under the bill, the Interagency Classification Review Committee would be abolished and its resources and records transferred to the Registrar.

8. The major provisions for the maintenance of the Register of National Defense and Foreign Policy Information include the following requirements:

a. Any document (or other matter) originated after this Act becomes effective may not be kept secret unless entered in the Register.

b. Any such entry must be made within 20 days of the origin of the document, except for overseas material, which shall be entered 20 days after received by an agency in the U. S.

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c. The entries shall include the following information: (1) a concise, complete description of the matter, including the title, if any; (2) the name of the originating agency; (3) the name and title of the classifier; (4) the name of each agency on distribution; (5) the date of origin and the date of classification; and (6) the date when classification can be withdrawn.

d. Each entry shall be indexed alphabetically by title or subject matter and by agency of origin. Aggregate entries may be made with respect to categories of documents too voluminous or too similar to require separate indexing. The Registrar can authorize agencies to substitute a code and title to identify an official whose activity in "gathering, transmitting, or analyzing secret information requires anonymity in the interest of his personal safety."

e. A duplicate Register shall be transmitted to the Joint Committee five days after the end of each month.

9. Four years after the effective date of this Act, no document originated less than 10 years earlier may be withheld from the public under this policy or exemption (b)(1) of the FOIA unless it has been entered in the Register. After the effective date of this Act, no document 10 years older or more may be withheld from the public for the same reasons unless it has been entered in the Register and the Joint Committee has been so notified.

10. Enactment of this bill would completely change the ground rules for the protection of national security information under which this Agency has operated by requiring that what has been exclusively an executive branch responsibility be shared with the legislative and judicial branches. The Agency might be able to get a de facto exemption from the Act by pointing out the conflict with the Director's responsibilities under the National Security Act of 1947 and the CIA Act of 1949, but our ability to protect our classified material when disseminated outside the Agency would be seriously impaired, particularly such materials as might be made available to the Congress.

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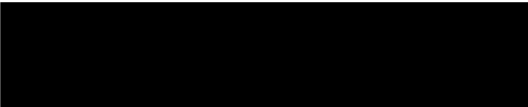
11. Assuming we had to comply with the proposed Act, we would be faced with a large administrative problem and an impossible information processing workload in advising the Registrar of all documents and other materials, including sensitive older records, which should be entered in the Register. CRS's automated index of intelligence documents, (AEGIS) does not cover documents produced prior to late-1967 and the format lacks several of the required data elements. The clause permitting classifiers to be identified by code under certain circumstances would not appear to apply to those of our employees who are not exposed to personal danger, and hence would expose the names of most of our key operating people.

12. The proposed powers of the Registrar to determine whether or not Agency policies for classification/declassification are in compliance with the policy of the new Act would infringe sharply on the powers of the DCI. Also, if the Registrar could approve or disapprove the Agency's final administrative action on a request for release of classified information, then the Director would have lost his ability to protect intelligence sources and methods.

13. The provisions for the Joint Committee's overview of the Register and the actions of the Registrar, and the power to call up from any agency any classified document for examination and review, and to release such documents to the public would further strip the Director of his protective ability. The Agency would apparently be subject to court orders in response to the Committee's subpoenas and other legal actions. Moreover, the Agency could be overruled by the Committee in such matters as safeguarding information turned over to Members, or Committees and their staffs, and the Agency's decisions on requests for public disclosure of classified information.

14. The Agency would appear to be in deep trouble if S. 3393 (or some approximately equivalent bill) were to be enacted--unless an exemption for it could be obtained. Otherwise, for the Director to retain the ability to protect intelligence sources and methods, he would have to rely exclusively on the provisions of the National Security Act of 1947 and the CIA Act of 1949, and this reliance would surely be subject to adjudication by the courts.

STATINTL


Chief, Information Systems Analysis Staff

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